IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1450 of 1998
With
SPECIAL CIVIL APPLICATION No. 3558 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VISNAGAR NAGRIK SAHAKARI BANK LTD. - Petitioner(s)
Versus
SEVANTILAL KALIDAS DARJI & 1 - Respondent(s)

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Appearance :
MR BS PATEL for Petitioner(s) : 1,MRS RANJAN B PATEL for Petitioner(s) : 1,
MR RAVINDRA SHAH for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 15/02/2007

ORAL JUDGMENT

1. Since these petitions involve similar questions of fact and identical questions of law, they

have been heard together.

2. In Special Civil Application No.1450/1998, the petitioner which is a cooperative bank has challenged a judgement and order dated 22nd July, 1997 passed by the Cooperative Tribunal at Ahmedabad rendered in Appeal No.8/96.

2.1 The petitioner bank had sanctioned a loan of Rs.1,25,000/- in favour of one Bhagyalaxmi Wooden Industry, a proprietary concern(here-in-after referred to as “the principal debtor”). Respondents herein stood as guarantors in favour of the principal debtor for securing such a loan. It may be noted that loan was sanctioned against hypothecation of goods in form of certain stock belonging to the principal debtor.

2.2 Since the principal debtor did not make payment regularly towards the installment, the petitioner-bank was compelled to file Lavad Suit against the principal debtor as well as the opponents herein before the Board of Nominees. The Board of Nominees by judgement dated 13th November, 1995, passed in Lavad Case No.124/1993 allowed the suit filed by the bank and decree in its favour was drawn as prayed for. The opponents were held liable to pay an amount of Rs.2,02,440/- with interest and costs.

2.3 The principal debtor as well as the respondents herein i.e. guarantors filed separate appeals before the Cooperative Tribunal. These appeals were heard together and by common judgement dated 22nd July, 1997, the Tribunal though dismissed Appeal no.15/96 filed by the principal debtor, allowed the Appeal no.8/96 filed by the respondents herein. The petitioner-bank is therefore, before this Court challenging the judgement of the Cooperative Tribunal.

3. It may be noted that the central controversy before the Courts below and one raised before this Court is with respect to the conduct of the bank vis-a-vis the hypothecation of stock belonging to the principal debtor. Principally, the stand of the respondents all through out has been that it was utter negligence on part of the bank due to which entire stock was siphoned away by the principal debtor. They, therefore, seek protection of the provisions contained in Section 139 and 141 of the Contract Act(here-in-after referred to as “the said Act”). The Board of Nominees however, did not accept the defence of the respondents herein. It was held that the Bank is entitled to recover the entire dues from all the defendants including the Sureties.

4. In the appeal at the instance of the Sureties

however, the Cooperative Tribunal was of the opinion that it was negligence on part of the bank which resulted into loss of hypothecated stock and that therefore, the bank cannot recover its dues from the respondents herein.

5. In Special Civil Application No.3558/2001, similarly, the petitioner bank has challenged a judgement and order dated 22nd June, 2000 passed by the Cooperative Tribunal in Appeal No. 317/1998. In this case, the petitioner-bank had given cash credit facility to the limit of Rs.60,000/- to one Ambica Textiles. The respondents herein had stood as guarantors. The cash credit facility was also secured through hypothecation of goods belonging to Ambica Textiles. When repayment was not regular, the petitioner-bank approached the Board of Nominees. The Board of Nominees by its judgement dated 18th May, 1998 allowed the suit of the bank. The respondents therefore, appealed against the judgement of the Board of Nominees before the Cooperative Tribunal. The appeal was allowed by the impugned judgement dated 22nd June, 2006.

6. Since facts are quite similar and reasonings adopted by the Cooperative Tribunal in allowing the respective appeals in both the proceedings are common, it would be sufficient to take note of factual aspects in detail as arising in

Special Civil Application No.1450/1998.

7. As noted earlier, the petitioner-bank sanctioned loan to the tune of Rs.1,25,000/- in favour of the principal debtor. The respondents nos. 2 and 3 herein stood as guarantors. An agreement to this effect was entered into between the parties on 30th May, 1989. Since the principal debtor did not repay the dues, bank filed Lavad Suit which as noted earlier came to be allowed against all the defendants. The appeal filed by the respondents before the Cooperative Tribunal was allowed. The Tribunal gave detailed reasons to come to the conclusion that it was on account of sheer negligence on part of the bank which led to disappearance of the stock. The Tribunal therefore, concluded that the principal debtor was successful in siphoning off the hypothecated goods only on account of negligence of the bank and its officers. The Tribunal therefore, found that the respondents herein cannot be held liable to repay the loan.

8. On the basis of these factual parameters, learned advocate appearing for the parties have made detailed submissions before me.

9. Learned advocate Shri B.S. Patel for the petitioner-bank submitted that the Cooperative Tribunal gravely erred in allowing the appeals of the guarantors. He submitted that they had

stood as Sureties with full understanding and their liability is coextensive with that of the principal debtor.

9.1 It was further contended that the Tribunal gravely erred in coming to the conclusion that the bank and its officers were negligent due to which the hypothecated goods came to be siphoned away by the principal debtor. Reliance was placed on section 128 of the said Act to contend that the liability of the Surety is coextensive with that of the principal debtor. Reliance was placed on the decision of Division Bench of this Court in the case of **Bimalsingh Duggal v. Central Bank of India and another** reported in AIR 2001 Gujarat 340, wherein the Court found that Sureties can take advantage of provisions contained in Section 139 of the said Act only if eventual remedy of surety is impaired by action of the creditor.

9.2 Reliance was placed on the decision of the Apex Court in case of **Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving Mills Ltd. and others** reported in AIR 2002 Supreme Court 1841, wherein it was observed that liability of the guarantor cannot but be stated to be strict liability and even if the principal debtor is discharged from his liability, unless such discharge is through the

act of the creditor without consent of the guarantor, the creditor's right of action against the sureties is preserved.

10. On the other hand, learned advocate Shri Ravindra Shah for the respondents in Special Civil Application No.1450/1998 opposed the petition. He submitted that the bank had wide powers under the agreement to secure its interest through the hypothecated goods. He submitted that the bank officers showed utter negligence in preserving the stock hypothecated by the principal debtor.

10.1 It was further submitted that the Cooperative Tribunal has come to definite findings of fact. This Court exercising writ jurisdiction would therefore, not disturb such findings. He further submitted that in view of the factual finding of the Tribunal that the bank officers were negligent which caused loss of hypothecated goods, respondents are entitled to protection of the provisions contained in Section 139 and 141 of the said Act.

10.2 Reliance was placed on the decision of Apex Court in the case of **the State Bank of Saurashtra v. Chitranjan Rangnath Raja and another** reported in AIR 1980 Supreme Court 1528, wherein finding that the pledged goods had been lost due to bank's negligence, Surety was

discharged to the extent of security lost.

10.3 Reliance was placed on the decision of Punjab and Haryana High Court in the case of **State Bank of India v. M/s. Quality Bread Factory, Batala and others** reported in AIR 1983 Punjab and Haryana 244, wherein also on finding that the hypothecated goods were lost on account of negligence of the pledgee, Surety was discharged of its liability.

10.4 Reliance was also placed in the decision of this Court in the case of **Union Bank of India, Bombay v. Suresh Bhailal Mehta and another** reported in AIR 1997 Gujarat 48 for the same purpose. Reliance was also placed in the decision of **M.R. Chakrapani Iyengar v. Canara Bank** reported in on AIR 1997 Karnataka 216 on the same issue.

11. Learned advocate Shri Tushar Mehta appearing for respondents in Special Civil Application No.3558/2001 adopted similar line of arguments and opposed the petition.

12. Having heard the learned advocates appearing for the parties, it may be noted that the Cooperative Tribunal in its judgement dated 22nd July, 1997 had come to definite finding of fact that the bank officers were utterly negligent which had occasioned siphoning away of

hypothecated goods. Being a finding of fact, its correctness shall have to be judged within a narrow compass since this Court is exercising powers under writ jurisdiction. Nevertheless, I have not only heard learned advocates appearing for the parties at considerable length on this aspect of the matter, I have also perused oral as well as documentary evidence on record. Firstly, the agreement between the parties produced at Annexure-C to the petition sufficiently safeguard the interest of the bank. The principal debtor was required to maintain stock, valuation of which had to be at-least twice the amount of loan sanctioned. The principal debtor further agreed that if at any point of time, the stock value went below the minimum level required to be maintained, it would immediately replenish the stock or in the alternative make repayment of that much part of the loan to the bank to maintain the required ratio. The principal debtor further agreed that in case it failed to maintain the stock accordingly it would be open for the bank to recover the entire outstanding dues forthwith.

13. Despite such stringent provisions, it is an admitted position that when the bank sought to recover dues through stock hypothecated by principal debtor, the bank found the go-down virtually empty. This essentially means that right under the very nose of the bank, the

principal debtor despite his undertaking and agreement not only failed to maintain desired level of stock, in fact, siphoned away entire pledged goods.

14. Significantly, it has also come on record that from the very outset, the principal debtor made no repayment of loan received from the bank. It has also come on record through cross examination of the bank witness that at no stage either before, during or after sanctioning of the loan, the bank officers ever physically verified the stock position. It has further come on record that after initially receiving statements of stock for few months from the principal debtor, practice of receiving such statement was also discontinued.

15. Some total of these factual undisputed factors is that the Tribunal was perfectly justified in concluding that it was utter carelessness and negligence on part of the bank and its officers which only resulted into total loss of the stock. But for such negligence, it would not have been possible for the principal debtor to siphon away the entire stock right the very nose of the bank.

16. In view of this inescapable conclusion, further legal consequences are not difficult to decide.

17. Section 139 and 141 of the said Act read as follows :

> “139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.- If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.
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> 141. Surety's right to benefit of creditor's securities.-A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.”

18. From the plain reading of the provisions contained in the above mentioned sections, the present case is covered by the protection which the Sureties would receive. Combined effect of the two provisions would clearly apply in facts of the present case. By action of the bank it had impaired the remedy of the surety against the principal debtor. Furthermore, it is also not difficult to hold that the creditor had lost the security in full and to that extent, the surety stood discharged. In the case of **Bimalsingh Duggal v. Central Bank of India and another** (supra) Division Bench of this Court was considering a situation where the bank had after

lending money for purchase of a truck, sold the truck to secure a part of its debt. The contention of surety that the action of the bank would enable him to seek protection under Section 139 of the said Act was negatived by this Court holding that the surety was not impaired on account of the action of the bank. Factual aspects being vitally different, ratio laid down therein would not apply to this case.

19. In case of **Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving Mills Ltd. and others** (supra), it was found that the security was not lost by the creditor but it was an operation of law over which none of the parties had any control. It was in this background that the Apex Court observed that liability of the guarantors cannot but be stated to be a strict liability and even if the principal debtor is discharged from his liability without the consent of the surety/guarantor, the creditor's right of action against Surety is preserved. As noted earlier, in the present case, this Court has upheld the conclusions of the Cooperative Tribunal that it was an act of utter negligence on part of the bank and its officers which led to the loss of security.

20. As noted earlier, facts leading to Special Civil Application No.3558/2001 being

substantially similar, I have discussed the evidence on record arising in Special Civil Application No.1450/1998 and do not find it necessary to separately take note of detailed factual aspects contained in the other petition. Suffice to say that factual aspects being substantially similar, legal conclusions would apply in both cases.

21. In the result, I find no merits in either of the petitions, same are dismissed. Rule is discharged in each petition. No costs.

(Akil Kureshi,J.)

(raghu)